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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

EVERFRESH BEVERAGES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND LOCAL 51, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Decision and Order of the National Labor Relations Board is supported by substantial evidence where the only relevant evidence before the Board is undisputed and contrary to its findings, and where the Board has made no credibility determinations in support of its conclusions.

LIST OF PARTIES

The National Labor Relations Board was the Petitioner below and is a Respondent before this Court.

Local 51, International Brotherhood of Teamsters, AFL-CIO was the Intervenor below and is a Respondent before this Court.

Everfresh Beverages, Inc. was the Respondent below and is the Petitioner before this Court.

RULE 29.6 LISTING

The parent company of Everfresh Beverages, Inc. is NewBevco, Inc. The parent company of NewBevco, Inc. is National Beverage Corp.

Everfresh Beverages, Inc. has no subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Everfresh Beverages, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit enforcing the Order of the National Labor Relations Board.

OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals is unreported and is reprinted in the accompanying Appendix at pages A-1 through A-2. The Decision and Order of the National Labor Relations Board is reported at 323 NLRB No. 52 and is reprinted in the accompanying Appendix at pages A-3 through A-19. The stay of the mandate of the Sixth Circuit pending the filing of this petition is unreported and is reprinted in the accompanying Appendix at pages A-20 through A-21.

JURISDICTION

The Sixth Circuit entered its decision in this case orally on August 7, 1998 and in writing on August 11, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) as made applicable by 29 U.S.C. § 160(e).

STATUTORY PROVISION INVOLVED

Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), provides in pertinent part:

> The findings of the [National Labor Relations] Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

STATEMENT OF THE CASE

1. The Proceedings Below

This case was originally heard before an Administrative Law Judge ("the Judge") of the National Labor Relations Board (the "Board") on September 18, 1996. The case arose out of Everfresh Beverages, Inc.'s ("Everfresh's") purchase of certain assets of a bankrupt debtor in possession, among which was a juice bottling plant in Warren, Michigan. Soon after the purchase, Teamsters Local 51 (the "Union") made a demand for recognition and bargaining as the purported representative of certain employees at the Warren plant. Everfresh declined to recognize or bargain with the Union pursuant to *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 107 S. Ct. 2225 (1987) because Everfresh had not yet hired a substantial and representative complement of employees. On November 18, 1996 the Judge issued a Decision and Recommended Order finding that Everfresh had violated Sections 8(a)(5) and (1) of the National Labor Relations Act by refusing to recognize the Union. The Judge ordered Everfresh to bargain with the Union.

On December 16, 1996 Everfresh filed its exceptions with the Board. On March 31, 1997 the Board issued its Decision and Order, reported at 323 NLRB No. 52, affirming the Judge's rulings, findings and conclusions, and adopting the Judge's recommended Order as modified.

On June 19, 1997 the Board sought enforcement of its Order in the United States Court of Appeals for the Sixth Circuit pursuant to 29 U.S.C. § 160(f). On August 7, 1998 the Sixth Circuit enforced the Board's Order.

2. Statement of Facts

On March 15, 1996 Everfresh purchased a juice bottling plant in Warren, Michigan from a bankrupt debtor in possession (the "predecessor"). During its last year of normal production the predecessor had employed a monthly average of sixty-six employees at the Warren plant, with a peak of approximately eighty employees during the summer of 1995. The Warren operation had been highly successful under the predecessor. Before filing for bankruptcy on November 17, 1995 the predecessor had experienced a 40% growth in sales since 1993. In fact, the predecessor's bankruptcy had nothing to do with the performance of the Warren juice business but was driven by losses from the predecessor's Canadian division and from brands other than the one produced in Warren.

The bankruptcy nonetheless had a detrimental effect upon the Warren business. Because of the company's overall shortage of funds, the predecessor was no longer able to promote its products. It was also unable to extend credit to its distributors, which led many of them to seek other suppliers. As a result, the number of distributors carrying the product bottled in Warren dropped from 163 in 1995 to 103 in early 1996.

The predecessor's production and maintenance employees in Warren were represented by Teamsters Local Union 51. On March 15, 1996, upon selling its

assets, the predecessor terminated all of its employees. Those employees were then invited to apply the following day for employment with Everfresh. Everfresh began operations in Warren on March 18, 1996 with eighteen employees, all of whom were former union-represented employees of the predecessor. In the weeks after startup seventeen additional employees were hired, none of whom were former employees of the predecessor.

At the time of the hearing Everfresh reasonably expected employment levels to return to those of the predecessor. These expectations were the subject of undisputed testimony from two of Everfresh's witnesses: Richard McKenzie, Director of Human Resources for Everfresh's parent company, and Peter Vitulli, President of Everfresh. They explained that at the time of the hearing Everfresh had begun efforts to regain the distributors that the predecessor had lost. Everfresh had begun extending credit to its distributors again. Everfresh had also begun reviving the promotional programs that the predecessor had become unable to fund. Further, a number of the predecessor's former distributors had made verbal commitments to resume distributing Everfresh products when their current distribution arrangements expired in the fall and winter of 1996. Thus, Everfresh expected to achieve the same level of production, and the same number of employees, as the predecessor had enjoyed during its normal operations the year before. Though these projections had not yet been realized by the time of the hearing, there was nonetheless no dispute as to the factors that would lead to increased business and an expanded bargaining unit. These projections were based not on the acquisition of new business,

but mainly on the recapture of business temporarily lost due to the predecessor's financial trouble. Under these projections, three of Everfresh's five job classifications had less than half of their projected employee complement at the time of the hearing.

REASONS FOR GRANTING THE WRIT

The writ should be granted because this petition raises the significant question whether an order of the National Labor Relations Board may stand where the only relevant evidence before the Board is undisputed and contrary to its findings, and where the Board has made no credibility findings in support of its conclusions.

The only issue placed before the Board was whether Everfresh had a substantial and representative complement of employees at the time of the Union's bargaining demand such that it was obligated to recognize and bargain with the Union. *See, e.g., Fall River,* 482 U.S. at 47, 107 S. Ct. at 2238. Everfresh maintained that it did not have a substantial and representative complement because it reasonably expected the bargaining unit to expand in the near term. The Board found that Everfresh had a substantial and representative complement of employees, but it could do so only by ignoring or discounting undisputed testimony that was directly contrary to its findings, as to which it never made any credibility determinations, and which was the only evidence presented in the case on the issue of substantial and representative complement.

The only evidence presented by either party on the issue of substantial and representative complement was the testimony of Everfresh's two witnesses. Their undisputed testimony indicated that Everfresh had prospered under the predecessor, and had gone bankrupt only because of other problems within the parent company. They also explained that Everfresh had begun to take concrete steps to regain distributors lost in the bankruptcy, and had even received verbal commitments from many of those distributors to return to Everfresh when their current distribution agreements expired. They also testified that 40% of Everfresh's job classifications were less than half full at the time of the Union's demand. *See Fall River*, 482 U.S. at 52, 107 S. Ct. at 2240 (finding substantial and representative complement where employer "had hired at least fifty percent of those it would ultimately employ in a majority of job classifications.") All of this evidence indicated that the bargaining unit was reasonably expected to expand. Under Board precedent, this would have required a finding that the bargaining demand was premature. *Myers Custom Prods.*, 278 NLRB 636, 637 (1986); *Trailmobile, Div. of Pullman, Inc.*, 221 NLRB 954 (1975); *K-P Hydraulics Co.*, 219 NLRB 138 (1975).

The Board exceeded its authority in failing to give this undisputed testimony the weight to which it was entitled. Neither the Judge nor the Board ever made any findings as to the credibility of Mr. McKenzie or Mr. Vitulli. Instead, the Judge simply discounted their testimony without giving a reason for doing so. He inexplicably stated that Everfresh had offered no "concrete or

substantive evidence," and "[n]othing to indicate a firm foundation upon which to base a legitimate projection requiring increased production." (Appendix, pp. A-15-16). Similarly, the Board wrote that Everfresh had "no objective basis" for its projections, and that it was "merely hopeful" of an increase. (Appendix, p. A-4). Hence, both the Judge and the Board wrongly concluded that the expectation of an expanding workforce was "an exercise in blind faith" and "mere wishful thinking." (Appendix, p. A-16). The Judge even went so far as to belittle Everfresh's projections, calling them "at best [an] optimistic hope that failure could magically be converted into success by mere wishful thinking." (Appendix, p. A-16).

Such a cavalier approach to the evidence represents an abuse of the Board's adjudicative power. This Court long ago recognized that the Courts of Appeals are charged with seeing that the Board acts reasonably and with due regard for the evidence before it in adjudicating cases:

> "[C]ongress has imposed on [reviewing courts] responsibility for assuring that the Board keeps within reasonable grounds. . . . The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses. . . . "

Universal Camera Corp. v. NLRB, 340 U.S. 474, 490, 71 S. Ct. 456, 466 (1951). The decision of the Board did not meet this standard because it did not make a "fair estimate" of

the undisputed testimony that showed that the bargaining unit would expand. It is most significant that neither the Judge nor the Board gave any reason for ignoring, discounting or mischaracterizing this testimony. Accordingly, under this Court's *Universal Camera* and other decisions, the Board's Decision and Order should not have been enforced. *See, e.g., Dickinson v. U.S.*, 346 U.S. 389, 396-97, 74 S. Ct. 152, 157 (1953) (overturning administrative decision that was contrary to uncontradicted and unimpeached evidence), *noted in NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 420, 82 S. Ct. 853, 861 (1962) (Frankfurter, J. dissenting); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 328, 85 S. Ct. 955, 972 (1965) (Goldberg, J. concurring in the result) (agreeing that the Court correctly overturned Board decision in which evidence contrary to Board's decision was undisputed and Board had not "resolved testimonial controversies" in reaching its conclusions).

This issue is of particular importance because of its implications for adjudication before the Board. Although *Universal Camera* requires the Board to make a "fair estimate" of the worth of testimony, it does not make clear what must be the effect of undisputed testimony from witnesses who have not been discredited. The cases cited above suggest that the Board is not free to discount such testimony, but absent a direct statement to that effect from this Court, the Board can continue to act as it did in this case, improperly discounting material evidence and generating uncertainty and further litigation as a result. Courts of Appeals may feel compelled to affirm such actions, as well. Such consequences could be avoided by this Court's guidance on an issue raised but not resolved by *Universal Camera*. Everfresh respectfully submits that

this substantial issue justifies further review, and therefore prays that its petition be granted.

CONCLUSION

For the foregoing reasons, Everfresh respectfully prays that this Court grant its petition and issue the writ.

Respectfully submitted,

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Case No: 97-5736

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

(Filed Aug. 11, 1998)

NATIONAL LABOR RELATIONS BOARD

Petitioner

TEAMSTERS LOCAL 51

Intervenor

v.

EVERFRESH BEVERAGES, formerly known as EB Acquisition Corp., successor

Respondent

BEFORE: MERRITT, KENNEDY, and GILMAN; Circuit Judges.

On petition to enforce an order of the National Labor Relations Board,

This cause came on to be heard on the record of the Board, the briefs and oral argument of the parties. Upon due consideration thereof the court finds that the findings and order of the Board are supported by substantial evidence on the record as a whole.

It is therefore **ORDERED** that the order of the Board in this case be and it hereby is **ENFORCED**.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Everfresh Beverages f/k/a EB Acquisition Corp., successor *and* Local 51, International Brotherhood of Teamsters, AFL-CIO.

Case 7-CA-38325

March 31, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The issue presented in this case[1] is whether the judge correctly found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[2] and conclusions and to adopt the recommended Order as modified.[3]

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[1] On November 18, 1996, Administrative Law Judge William F. Jacobs issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

The Respondent asserts that it did not have an obligation as a successor employer to bargain with the Union because, at the time of the Union's bargaining demand, it did not employ a substantial and representative complement of its intended workforce. We agree with the judge's rejection of this argument. At the time of the Union's bargaining demand, the Respondent had no objective basis for reasonably expecting that its workforce would soon expand beyond its initial complement of 19 unit employees, all of whom had formerly been employed by the Respondent's unionized predecessor. Rather, the Respondent's officials were merely hopeful that sales would ultimately rebound to justify hiring up to a peak employment level of 60 to 70 employees. Regardless of whether these hopes ultimately were realized (in fact, they were not) or whether the workforce subsequently expanded to some extent, the Respondent did not present a legitimate basis for deferring, beyond the date of the Union's demand, the determination of whether the successorship obligation had attached. Delta Carbonate, 307 NLRB 118, 119 (1992), enfd. 989 F.2d 486 (3d Cir. 1993); M.U. Industries, 284 NLRB 388, 389 (1987). Accordingly, the Respondent's obligation to recognize and bargain with the Union dates from the Union's March 20, 1996 demand.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Everfresh Beverages f/k/a EB Acquisition Corp., successor, Warren, Michigan, its officers, agents, successors,

and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a):

"(a) Failing and refusing to recognize and bargain with Local 51, International Brotherhood of Teamsters, AFL-CIO as the exclusive representative in the following appropriate unit:

> All production and maintenance employees employed by Respondent at its Warren, Michigan facility, but excluding office clerical employees, guards and supervisors as defined in the Act."

2. Substitute the following for paragraphs 2(b) and 2(c):

"(b) Within 14 days after service by the Region, post at its Warren, Michigan, facility, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the

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"[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading 'Posted by Order of the National Labor Relations Board' shall read 'Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.'

Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings [sic], the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 22, 1996.

"(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

Dated, Washington, D.C. March 31, 1997

/s/ _____
William B. Gould IV, Chairman

/s/ _____
Sarah M. Fox, Member

/s/ _____
John E. Higgins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Ellen Rosenthal, Esq., for the General Counsel.

G. Paris Sykes Jr., Esq., of Atlanta, Georgia, for the Respondent.

Wayne Rudell, Esq., of Dearborn, Michigan, for the Charging Party.

DECISION

Statement of the Case

William F. Jacobs, Administrative Law Judge. This case was tried before me on September 18, 1996,[1] in Detroit, Michigan. Local 51, International Brotherhood of Teamsters, AFL-CIO (the Union) filed the original charge in Case 7-CA-38325 on March 22. Complaint[2] issued on May 24 and was amended September 11. The amended complaint, in relevant part, alleges that Everfresh Beverages f/k/a EB Acquisition Corp. (the Respondent, the Company or the Employer) unlawfully failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees. In its answer, Respondent denies the commission of any unfair labor practices.

All parties were represented at the hearing and were afforded full opportunity to be heard and to present evidence and argument. The General Counsel and Respondent filed briefs. Upon the entire record, my observation of the demeanor of the witnesses and after giving due consideration to the briefs, I make the following

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[1] Hereinafter, all dates are in 1996 unless noted otherwise.

[2] An order consolidating cases, consolidated complaint and notice of hearing issued on May 24 consolidating this case with Case 7-CA-37917. These cases were subsequently severed by Order dated September 11, 1996.

FINDINGS OF FACT[3]

At all material times through November 17, 1995, Everfresh Beverages, Inc. (Everfresh) was engaged in the business of bottling and nonretail selling of beverages at its Warren, Michigan facilities.

On November 17, 1995, Everfresh filed under Chapter 11 of the U.S. Bankruptcy Code. Thereafter, Everfresh was granted authority as debtor-in-possession (D.I.P.), to continue its business operations and did so, without interruption.

On February 7, Respondent entered into an asset purchase agreement which required Everfresh, until the final closing of the sale, to continue its business consistent with past practices, preserving its relationship with customers and suppliers and retaining the services of its employees. The closing took place on March 15 and the transfer of ownership was accomplished.

About 2 p.m. on Friday, March 15, Plant Manager Mark Hinebaugh called the employees into the conference room. There, Plant Personnel Manager Michele Simon and National Beverage Corporation's[4] human resources director, Richard McKenzie, told them that the plant had been sold to National Beverage. They advised the employees that they were all terminated from Everfresh but if they would come in the following day and fill out an application, they might possibly be hired.

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[3] In its answer, Respondent concedes jurisdiction and the status of the Union as a labor organization.

[4] Respondent's parent corporation.

McKenzie explained that the new owner intended to continue to operate the plant; that after closing the plant it would reopen it as soon as possible and invited all employees who wished to do so, to apply for employment. McKenzie mentioned that interviews would be conducted the following morning at 9 a.m. McKenzie testified that Respondent wanted to open the doors on Monday, March 18 and start operations immediately, running the plant, when opened, exactly as it had been run the previous Friday. As of March 15, there were 28 employees in the production and maintenance unit, 22 of them actually working that day. The D.I.P. ceased operations at the Warren plant that day.

McKenzie testified that Respondent had two rehiring plans, one short term, the other long term. The short-term plan involved getting the doors open as quickly as possible and continuing the operation already extant with the same employees. The long-term plan involved expanding the operation, Respondent's sales, production and number of employees to between 60 and 70. This, Respondent hoped, would be accomplished by midsummer.

To be open immediately, Respondent would have to rehire enough employees to man two lines but not more because it did not have enough raw goods on hand. Apparently there were enough raw goods on hand to meet immediate production requirements as reflected by current sales. Respondent expected to have the two lines up and running by Tuesday or Wednesday of the following week.

According to McKenzie, the expectation of having 60 to 70 employees working by midsummer was based on four factors:

1. The Company's past operations. McKenzie testified that he analyzed the Company's records and came up with an average monthly head count which supported his long-range projection.

McKenzie's testimony concerning his analysis of company records was not, however, supported by any documentation.

2. Peter Vitulli's forecast. Vitulli advised McKenzie as to how soon he felt the Company's lost business could be recovered.

Vitulli testified as to the reasons why he forecasted success for the Company but offered no concrete evidence, no documentation, and no foundation upon which any legitimate forecast or projection could possibly be based.

3. Mark Hinebaugh's economic analysis. Hinebaugh, the plant manager, had reported to McKenzie that he thought that there was a very big "pent-up demand;" "that there would be a heavy rush of people who had been waiting to buy the product and hadn't bought it because it had been in bankruptcy." McKenzie explained that "perhaps" old customers who had not purchased the product recently because they could not get terms, would return once again, if they could get credit rather than having to pay cash. Hinebaugh did not testify.

4. Robert Rayes, president of the Union and other people's optimism. McKenzie testified that he relied on the optimism of people who knew the business when he projected the need for an estimated 60 to 70 employees by midsummer. Rayes did not testify.

On Saturday, March 16, about 8 a.m., McKenzie interviewed Hinebaugh and Simon and tentatively hired them subject to receiving their drug screening results. The three subsequently interviewed supervisors and made similarly conditioned offers of employment. They then interviewed the rank-and-file employees as they applied, advising them of the terms and conditions of employment and telling them that they would be contacted within the next 24-48 hours if Respondent decided to hire them.

On the afternoon of Saturday, March 16, McKenzie, Hinebaugh and Simon met to decide which of the interviewees would be hired. They then instructed various supervisors to start making calls to those individuals chosen as potential hires and have them report to the plant Monday morning, March 18, to review new-hire information and fill out the necessary forms. Respondent contacted 18 employees that day, all of whom had still been employed by Respondent as of the previous day.

On March 18, Respondent began operations at the Warren plant with the 18 employees it had contacted on March 16, all employees in the unit represented by the Union as of March 15 and before. Employed also, on March 18, were five managerial and supervisory personnel previously employed by Respondent's predecessor on March 15. The 18 unit employees, after meeting with

management and signing the required papers, returned to their old jobs, identical to those they held as of March 15.

On March 18, Hinebaugh contacted Rafel White, an ex-employee of Everfresh, told him that National Beverage Company had bought Everfresh, and asked him if he would come back and work for Respondent. White, who had been an employee of Everfresh for 8 years, had quit a few months before and taken a job with an interim employer. As of Hinebaugh's March 18 call to him, White was unemployed. White accepted Hinebaugh's invitation and agreed to come in and file an application. He did so and was back as a full-time employee with Respondent as of March 21.[5]

As of March 19, Respondent had a production line up and running which was better than anticipated. All of the employees were ex-employees of Everfresh. The short-term plan was effectuated within the first 2 weeks.

On March 20, Robert Rayes wrote identical letters to McKenzie and Hinebaugh advising them that the Union represented all of Respondent's employees, demanding recognition, and requesting that negotiations commence immediately.

On March 21, McKenzie replied on behalf of Respondent, stating that the number of employees hired since March 16 did not, at that time, constitute a majority of the employees who would eventually be employed by the

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[5] White's situation is in issue only insofar as it affects the majority status of the Union during later periods. It is not relevant to the findings as found herein and, for that reason, is not discussed further.

Company. On this basis, McKenzie advised the Union that its request for recognition was premature and that the Company was declining recognition and refusing to commence negotiations at that time. The letter concluded with the statement that at such time as its hiring process had achieved the anticipated substantial and representative complement of bargaining unit employees at the Warren location, it would make an appropriate response to the Union. Meanwhile the Union's request for recognition would be treated as a continuing one.

Conclusions

Successorship

In preparation for the hearing in this case, the parties offered into evidence a number of stipulations. These stipulations were supported by the testimony of a number of witnesses. The stipulations are as follows:

> 1. Everfresh Beverages, f/k/a EB Acquisition Corp. referred to in the Complaint and Answer as "Respondent EB," purchased certain assets from Everfresh Beverages, Inc., a debtor-in-possession (hereafter "D.I.P."), on March 15, 1996, as more particularly described in an asset purchase agreement between those parties dated February 7, 1996, and Bill of Sale dated March 15, 1996, which will be offered as joint exhibits at the hearing in this matter.
>
> 2. Respondent D.I.P. ceased operations at the plant involved in the asset purchase agreement located at 6600 East Nine Mile Road, Warren, Michigan, 48091, on March 15, 1996, and Respondent EB began operation of the plant involved in the asset purchase, located at 6600

East Nine Mile Road, Warren, Michigan, 48091, on March 18, 1996, with employees it began hiring on March 16, 1996.

3. Respondent EB's business operations at the plant in Warren, Michigan are essentially the same as those of D.I.P. since March 15, 1996.

4. Respondent EB uses the same plant as D.I.P. in Warren, Michigan.

5. Substantially the same jobs exist at Respondent EB's Warren, Michigan plant under the same physical working conditions as existed with D.I.P.

6. The wages and benefits and other terms and conditions of employment of employees of Respondent EB at its Warren, Michigan plant were initially established by it prior to hiring its work force, were communicated to applicants at the time they were employed as a condition of employment, and are different from those which had been paid and provided by D.I.P. prior to March 15, 1996, except for shift hours, and the wage rates of employees previously employed by D.I.P. whose wage rates exceeded the wage scale established by Respondent EB, which remained the same.

7. All of the same supervisors who had been employed by D.I.P. at the Warren, Michigan plant on March 15, 1996 have been employed by Respondent EB as supervisors since it began its operation on March 18, 1996. In addition, Respondent has hired three supervisors who were not employed as supervisors by D.I.P. but were employed by D.I.P. as bargaining unit employees.

8. All of the machinery, equipment and methods of production are used at the Warren, Michigan plant by Respondent EB as were used by D.I.P. except that Respondent EB has not to the present time used the equipment on one production line.

9. The same product is manufactured for sale by Respondent EB as was manufactured by D.I.P. at the Warren, Michigan plant.

10. The product manufactured by Respondent EB at the Warren, Michigan plant is being sold to approximately two-thirds of the customers that had been customers of D.I.P. for product manufactured by it at the plant prior to March 15, 1996, which customers are drawn from the same basic body of customers of D.I.P., and are located in the same geographic area.

I find that these stipulations, considered alone or with the supporting testimony of the General Counsel's witnesses, are sufficient to warrant the conclusion that Respondent is the successor to Everfresh Beverages, Inc.[6]

The Expanding Unit Defense

The record in this case is totally devoid of any concrete or substantive evidence to support Respondent's claim that it honestly had reason to believe the unit of employees represented since 1965 by the Union was expanding. There is no documentation that sales were increasing or were expected to increase. Nothing to indicate a firm foundation upon which to base a legitimate

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[6] *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987); and *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

projection requiring increased production and the hiring of additional employees [sic]. McKenzie's alleged projection was not a projection at all but an exercise in blind faith or, at best, optimistic hope that failure could magically be converted into success by mere wishful thinking. Respondent's refusal to recognize and negotiate with the Union as the designated exclusive collective-bargaining representative of its employees under the circumstances of this case cannot be countenanced and is clearly in violation of Section 8(a)(5) and (1) of the Act.[7]

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom and from infringing in any like or related manner upon its employees' Section 7 rights and that it take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by Respondent at its Warren, Michigan facility,

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[7] *M.U. Industries*, 284 NLRB 388 (1987); and *Delta Carbonate*, 307 NLRB 118 (1992), enfd. 989 F.2d 486 (3d Cir. 1993).

but excluding office clerical employees, guards and supervisors as defined in the Act, constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER

The Respondent, Everfresh Beverages, Warren, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Local 51, International Brotherhood of Teamsters, AFL-CIO as the exclusive collective-bargaining representative of the employees in the appropriate unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, upon request, meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit.

(b) Within 14 days after service by the Region, post at its facility in Warren, Michigan plant, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuously located places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. November 18, 1996.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to recognize and bargain with Local 51, International Brotherhood of Teamsters, AFL-CIO as the exclusive collective-bargaining representative of employees in the appropriate unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize, meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

> All production and maintenance employees employed by us at our Warren, Michigan facility, but excluding office clerical employees, guards and supervisors as defined in the Act.

EVERFRESH BEVERAGES
F/K/A EB ACQUISITION CORP.,
SUCCESSOR

Case No: 97-5736

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

(Filed Sep. 09, 1998)

NATIONAL LABOR RELATIONS BOARD

Petitioner

TEAMSTERS LOCAL 51

Intervenor

v.

EVERFRESH BEVERAGES, formerly known as EB Acquisition Corp., successor

Respondent

BEFORE: MERRITT, KENNEDY, and GILMAN; Circuit Judges.

Upon consideration of the objections filed by Everfresh Beverages to the National Labor Relations Board's Bill of Costs, and Everfresh Beverages' motion to stay the mandate pending the filing of a Petition for Writ of Certiorari,

And further considering the National Labor Relations Board's response in opposition to the motion for stay,

It is **ORDERED** that the Bill of Costs filed by the National Labor Relations Board be, and it hereby is, **GRANTED**. It is further **ORDERED** that the motion for stay be, and it hereby is, **GRANTED**. The mandate is stayed for thirty days from this Order unless the Court is

advised that the Petition for Writ of Certiorari has been filed.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk